
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to increase
2 transparency and accountability in state contracts by requiring
3 procurement officers to obtain and consider all available,
4 recent, and relevant performance by a contractor as part of the
5 due diligence requirement for contractor responsibility
6 determination prior to awarding a contract under Hawaii's
7 procurement code.

8 SECTION 2. Section 103D-104, Hawaii Revised Statutes, is
9 amended as follows:

10 1. By adding a new definition to be appropriately
11 inserted and to read:

12 "Past performance" means all available, recent, and
13 relevant performance by a contractor on state, federal, or
14 private contracts to be considered for purposes of a
15 responsibility determination for a particular solicitation."

16 2. By amending the definition of "responsible bidder or
17 offeror" to read:



1 "Responsible bidder or offeror" means a person who has the
2 capability in all respects to perform fully the contract
3 requirements, and the integrity and reliability ~~[which]~~ that
4 will assure good faith performance~~[-]~~, pursuant to the
5 responsibility determination standards adopted by the policy
6 board."

7 SECTION 3. Section 103D-310, Hawaii Revised Statutes, is
8 amended by amending subsection (b) to read as follows:

9 "(b) Whether or not an intention to bid is required, the
10 procurement officer shall ~~[determine]~~ make a determination of
11 responsibility for any prospective offeror, pursuant to rules
12 adopted by the policy board, including whether the prospective
13 offeror has the financial ability, resources, skills,
14 capability, and business integrity necessary to perform the
15 work. For ~~[this]~~ the purpose~~[-, the]~~ of responsibility
16 determination, the procurement officer shall possess or obtain
17 available information sufficient to be satisfied that a
18 prospective offeror meets the applicable standards set forth by
19 the policy board. The procurement officer shall consider all
20 available recent and relevant past performance of the offeror as
21 it applies to a responsibility determination for the current



1 solicitation. The officer, in the officer's discretion, may
2 also require any prospective offeror to submit answers, under
3 oath, to questions contained in a standard form of questionnaire
4 to be prepared by the policy board. Whenever it appears from
5 answers to the questionnaire or otherwise, that the prospective
6 offeror is not fully qualified and able to perform the intended
7 work, a written determination of nonresponsibility of an offeror
8 shall be made by the head of the purchasing agency, in
9 accordance with rules adopted by the policy board. The
10 unreasonable failure of an offeror to promptly supply
11 information in connection with an inquiry with respect to
12 responsibility may be grounds for a determination of
13 nonresponsibility with respect to such offeror. The decision of
14 the head of the purchasing agency shall be final unless the
15 offeror applies for administrative review pursuant to section
16 103D-709."

17 SECTION 4. This Act does not affect rights and duties that
18 matured, penalties that were incurred, and proceedings that were
19 begun before its effective date..

20 SECTION 5. Statutory material to be repealed is bracketed
21 and stricken. New statutory material is underscored.



H.B. NO. 1292

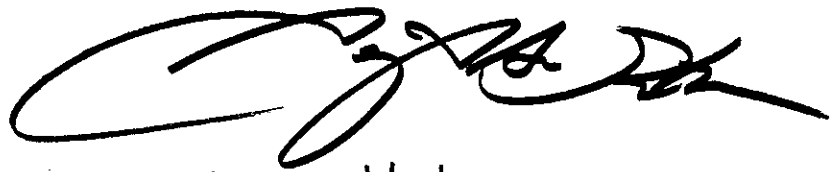
1 SECTION 6. This Act shall take effect upon its approval.

2

INTRODUCED BY:



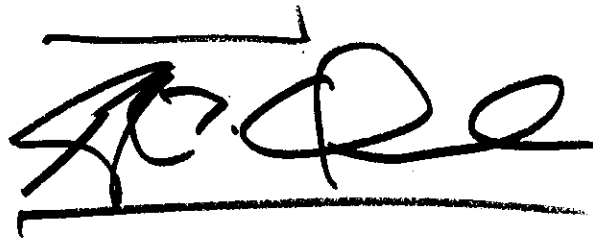
Richard Lugo



Mark Haden

Gary Dunn

BA



JAN 28 2015



H.B. NO. 1292

Report Title:

Procurement Code; Responsibility Determination; Past Performance

Description:

Includes all available relevant and past performance information considerations by the procurement officer prior to bids being awarded under the state procurement code.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



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**TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE HOUSE COMMITTEE
ON
ECONOMIC DEVELOPMENT & BUSINESS
February 13, 2015, 9:00 a.m.**

**HB 1292
RELATING TO PROCUREMENT**

Chair Kawakami, Vice-Chair Kong, and members of the committee, thank you for the opportunity to submit testimony on HB 1292. The State Procurement Office (SPO) is in SUPPORT of this measure and submits the following comments.

Earlier this year, the SPO delivered to the Legislature a report detailing the findings of a study the SPO conducted regarding the feasibility of requiring past performance as a factor in awarding any public contract in Hawai'i. The substance of this measure is a result of the findings and recommendations in the "Report on the Study on Past Performance Consideration in Hawaii Contracting" (SPO, January 2015).

The determination of responsibility is definitional to a fair, impartial, and value-driven procurement process. Responsibility ensures that a contractor has not only the *ability* to do the work but also possesses the *willingness and integrity* to do the work required. A contractor's "past performance," therefore, goes directly to its willingness and integrity to complete the work on time and satisfactorily. A contractor's record of performance also *informs the public* as to whether their tax dollars are being spent prudently.

While the SPO and some of our other procurement jurisdictions read current Hawai'i law as including an evaluation of contractor past performance in the responsibility determination, others interpret the Procurement Code as exclusive, and do not consider past performance. This inconsistency in application can result in inefficiencies and wasted tax-payer dollars.

By instituting a clear mandate *requiring* the consideration of past performance as part of the responsibility determination, this measure enhances accountability on the part of contractors and transparency on the part of the State.

The SPO also realizes that there may be a need to further define "past performance." In that regard, the SPO is willing to engage with community stakeholders and would suggest a working group or task force to examine and further delineate the necessary components of a working definition for past performance before moving forward.

Should the committee decide to move forward with this legislation, the SPO recommends *replacing* the language in *Section 2 and Section 3* with language found in Sections 2 thru 8 of SB 495, which provides an added degree of clarity:

SECTION 2. Section 103D-104, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition to be appropriately inserted and to read:

""Past performance" means available recent and relevant performance by the contractor on state, federal, or private contracts to be considered as a responsibility determination within the relevance of the current solicitation."

2. By amending the definition of "responsible bidder or offeror" to read:

""Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability [which] that will assure good faith performance[.], pursuant to the responsibility determination standards adopted by the policy board."

SECTION 3. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsection (f) to read as follows:

"(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be as objectively measurable[,], as possible, such as discounts, transportation costs, [and] total or life cycle costs[.], and the bidder's past performance on projects of similar scope for public agencies, including delays, number of contract change orders, contract extensions, cost overruns, corrective actions, responses to notices of deficiencies, and assessments of the bidder's prior work. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids."

SECTION 4. Section 103D-303, Hawaii Revised Statutes, is amended by amending subsection (g) to read as follows:

"(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals[.], which shall include the offeror's past performance on projects of similar scope for public agencies, including delays, number of contract change orders, contract extensions, cost overruns, corrective actions, responses to notices of deficiencies, and assessments of the offeror's prior work. No [other factors or] criteria [shall] may be used in the evaluation[.] that are not set forth in the request for proposals. The contract file shall contain the basis on which the award is made."

SECTION 5. Section 103D-304, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) The selection criteria employed in descending order of importance shall be:

- (1) Experience and professional qualifications relevant to the project type;

(2) Past performance on projects of similar scope for public agencies or private industry, including corrective actions [and other], responses to notices of deficiencies[;], and assessments of prior work;

- (3) Capacity to accomplish the work in the required time; and

(4) Any additional criteria determined in writing by the selection committee to be relevant to the purchasing agency's needs or necessary and appropriate to ensure full, open, and fair competition for professional services contracts."

SECTION 6. Section 103D-306, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for the required good, service, or construction, the determination is reviewed and approved by the chief procurement officer, the written determination is posted in the manner described in rules adopted by the policy board, a review of past performance has been conducted, and no objection is outstanding. The written determination, any objection, past performance evaluations relied upon, and a written summary of the disposition of any objection shall be included in the contract file."

SECTION 7. Section 103D-310, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Whether or not an intention to bid is required, the procurement officer shall [determine] make a responsibility determination for any awardee, pursuant to rules adopted by the policy board, including whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For [this] the purpose[, the] of responsibility determination, the procurement officer shall possess or obtain available information sufficient to be satisfied that a prospective offeror meets the applicable standards set forth by the policy board. The procurement officer shall consider past performance of the offeror as it applies to a responsibility determination for the current solicitation. The officer, in the officer's discretion, may also require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709."

SECTION 8. There is appropriated out of the general revenues of the State of Hawaii the sum of \$500,000 or so much thereof as may be necessary for fiscal year 2015-2016 and the same sum or so much thereof as may be necessary for fiscal year 2016-2017 for the purposes of implementing this Act.

The sums appropriated shall be expended by the state procurement office for the purposes of this Act.

Thank you.

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Testimony to the House Committee on Economic Development & Business

Friday, February 13, 2015

9:00 a.m.

State Capitol - Conference Room 325



RE: HOUSE BILL NO. 1292 RELATING TO PROCUREMENT

Dear Chair Kawakami, Vice-Chair Kong, and members of the Committee:

My name is Gladys Marrone, Chief Executive Officer for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii respectfully opposes H.B. 1292, which proposes to require procurement officers to obtain and consider all available, recent, and relevant performance by a contractor as part of the due diligence requirement for contractor responsibility determination prior to awarding a contract under Hawaii's procurement code.

Current law already allows for the consideration of past performance by the procurement officer. Requiring that procurement officers gather, organize, and consider all the prescribed information on each contractor that bids for public work represents a considerable burden on government with questionable return. Further, the subjectivity of the term "past performance" does not provide clear direction for procurement officers to follow with regard to the relative weight of one instance of "poor performance" over another. Further, including performance on private contracts in the scope of determination of a contractor's past performance would be even less feasible as procurement officers would be asked to make judgments based on third party data.

A few examples of questionable or concerning scenarios where subjectivity could result in unfair judgment include:

- A contractor having been a part of a delayed or over budget job where the cause could not be attributed to a specific party;
- A contractor who's project was adversely affected by the poor performance of a government agency or a sub-contractor;
- A contractor who's project was adversely affected by unexpected subgrade conditions, weather, or economic conditions.

If the Legislature is concerned about the poor or inadequate performance, we would humbly suggest that it work toward the efficient and effective enforcement of current laws regarding construction and public works. When projects are completed, and indeed as they are in progress, government should hold contractors accountable and, if displeased, take appropriate action which may preclude such contractors from doing any future work in the State.

Thank you for the opportunity to express our views on this matter.

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Rep. Derek S.K. Kawakami, Chair

Rep. Sam Satoru Kong, Vice Chair

Friday, February 13, 2015

9:00 a.m.

Room 312



SUPPORT for HB 1292 - PROCUREMENT

Aloha Chair Kawakami, Vice Chair Kong and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai'i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai'i individuals who are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 1292 includes all available relevant and past performance information considerations by the procurement officer prior to bids being awarded under the state procurement code.

Community Alliance on Prisons supports this measure in the interest of transparency and accountability. When public taxpayer dollars are used to purchase government services, it is vital that Hawai'i's due diligence is comprehensive and includes the past performance of the entity seeking funding. This due diligence should include past and current performance in other jurisdictions and any judgments against the entity.

Public disclosure of all bidders for a project should be mandated.

Mahalo for this opportunity to testify.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 13, 2015

TO: HONORABLE DEREK KAWAKAMI, CHAIR, HONORABLE SAM KONG AND MEMBERS OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

SUBJECT: **COMMENTS REGARDING TO H.B. 1292, RELATING TO PROCUREMENT.**
Includes all available relevant and past performance information considerations by the procurement officer prior to bids being awarded under the state procurement code.

LATE

Hearing

DATE: Friday, February 13, 2015
TIME: 9:00 a.m.
PLACE: Conference Room 312

Dear Chair Kawakami, Vice Chair Kong and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over hundred five hundred eighty (580) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

Thank you for the opportunity to testify on this measure. This bill is being proposed as a response to House Concurrent Resolution 176 (2014) which was initiated due to concern with regard to alleged bad performing contractors. **While GCA understands that the intent behind H.B. 1292, GCA believes that mandating the use of past performance criteria in low bid public work contracts are not the solution to eliminating bad performing contractors. Past performance can already be considered in the procurement process under HRS 103D-302(f), Invitation for Bid process, as deemed appropriate by the contracting agencies. Such consideration of past performance does not require a law change; instead it can be implemented through administrative rule changes or use of current law and procedures.**

H.B. 1292, Section 2 of the measure proposes to define past performance in Section 103D-104 as “all available, recent, and relevant performance by a contractor on state, federal, or private contracts to be considered for purposes of a responsibility determination for a particular solicitation.” Further the bill can be interpreted to **mandate the use of past performance in low bid contracts in determining the responsibility of any prospective bidder** as suggested in Section 3 of the bill, particularly Section 103D-310 (b), HRS. Additionally, on page 2, Lines 10-12 which deletes “determine” and replaces it with the words “procurement officer shall [determine] make a determination of responsibility for any prospective offeror . . .” The proposal also suggests that the procurement officer alone **shall consider all available recent and relevant past performance of the offeror.**

GCA has the following comments and poses the following questions with regard to implementation: What is recent and relevant, does this include private jobs that the government would have difficulty verifying whether a contractor's performance was adequate or "responsible"? The proposed language has the potential to apply across the board on all projects, including smaller repair and maintenance projects and CIP projects. Can the agency provide assurance that the process would be fair and can the contractor be assured adequate due process rights? How is one to ensure objective administration and evaluation processes for agencies in determining qualified past performance criteria; What about the inability for a new contractor to bid public work due to lack of past performance qualifications; Do agencies have the resources, including staff and funding for implementation and administration of past performance for low bid contracts; and moreover, concerns lie with ensuring efficiency, integrity and transparency in the procurement process of public works construction projects.

As mentioned consideration of past performance in procurement is already permitted under 103D-302(f) under the invitation for bid process, what is commonly known as low bid, however for various reasons agencies choose not to use it. Under Section 103D-302(f), HRS an invitation for bid may set the requirements to determine qualifications and criteria for a project. In other words, the agency may set the criteria and qualifications for the bidder in its bid specifications, which could include such criteria as past performance, recent project history and any other qualifications an agency may find necessary. In fact some agencies have shared that they have looked into such implementation, for example one agency is considering using the two step process whereby they allow all bidders to submit a qualifications, such submittals are reviewed and those that are deemed qualified would be invited to submit a bid.

GCA suggests that in order to implement such a mandated practice, there should be an agency that could take on a pilot program to work out the details of such a procurement practice before it is a mandate across all state and county agencies to avoid any unintended consequences.

Thank you for the opportunity to share our concerns and for considering our position.